STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellant,

-v-

TARONE DEVON WASHINGTON,

Defendant-Appellee.
_____/

Supreme Court No. _____

Court of Appeals No. 330345

Lower Court No. 2015001344 FH

AARON J. MEAD (P49413)
Assistant Prosecuting Attorney

MARILENA DAVID-MARTIN (P73175)
Attorney for Defendant
_____/

APPLICATION FOR LEAVE TO APPEAL

MICHAEL J. SEPIC (P29932)
Berrien County Prosecuting Attorney

By Aaron J. Mead (P49413)
Assistant Prosecuting Attorney
Berrien County Courthouse
St. Joseph, MI 49085
(269) 983-7111 Ext. 8311

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The People seek leave to appeal from the Court of Appeals' opinion vacating defendant's conviction for possession of a firearm during the commission of a felony (felony-firearm) under MCL 750.227b of the Penal Code. *People v Washington*, unpublished opinion per curiam of the Court of Appeals, issued 7/06/17 (Docket No. 330345) (Appendix A). The majority held that maintaining a drug house, MCL 333.7405(1)(d), could not be the underlying felony for a felony-firearm conviction under the Penal Code because the Public Health Code designates it as a misdemeanor, even though it meets the Penal Code's definition of a felony because it can be punished by imprisonment in state prison. *Id.*, slip op at 5-10. Judge Swartzle dissented on this point. *Id.*, slip op at 1-7 (Swartzle, J., concurring in part and dissenting in part).

The majority "urge[d] the prosecutor to appeal this case and for the Supreme Court to grant leave and definitively resolve the status of two-year misdemeanors for purposes of the felony-firearm statute." *Washington*, slip op at 10. That issue involves a legal principle of major significance to the state's jurisprudence. MCR 7.305(B)(3). It is quite foreseeable that an individual who maintains a drug house may concurrently possess a firearm. And there are other "two-year misdemeanors" – offenses which are felonies under the Penal Code because they are punishable by up to two years' imprisonment in state prison, but which are designated as misdemeanors in other statutes outside the Penal Code. Some of these, such as possession of marijuana, second offense, MCL 333.7403 and MCL 333.7413; and resisting and obstructing a conservation officer, MCL 324.1608; would also commonly be committed by an offender who simultaneously possesses a firearm. In other words, this issue will arise frequently.

The majority's opinion, moreover, conflicts with a decision of this Court. MCR 7.305(B)(5)(b). As discussed below, this Court established in *People v Smith*, 423 Mich 427,

442-445; 378 NW2d 384 (1985), that definitions of "felony" and "misdemeanor" within a particular statutory code should control for purposes of that code, despite different definitions found in another code. The Court of Appeals majority violated this rule by importing into the Penal Code, which has its own definitions of "felony" and "misdemeanor," a misdemeanor label from the Public Health Code. And the Court of Appeals' decision is clearly erroneous and will cause material injustice, MCR 7.305(B)(5)(a), because the Legislature intended to punish defendant's conduct of possessing a firearm while maintaining a drug house. Further injustice will likely result when other defendants and courts rely on this decision to avoid punishment for other conduct to which the Legislature intended the felony-firearm statute to apply.

The People request that this Court peremptorily reverse the Court of Appeals and reinstate defendant's felony-firearm conviction. In the alternative, the People request that this Court grant their application for leave to appeal and allow further briefing and argument.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this application for leave to appeal under MCR 7.303(B)(1).

STATEMENT OF QUESTION PRESENTED

The Penal Code defines the offense of possession of a firearm during the commission of a felony (felony-firearm). The Penal Code also defines "felony," and the offense of maintaining a drug house meets that definition. Is maintaining a drug house a felony for purposes of the felony-firearm statute, regardless of how it is labeled in the Public Health Code?

Plaintiff-Appellant answers: "YES"
Defendant-Appellee answers: "NO"
The trial court was not presented with this question.
The Court of Appeals majority answered: "NO"

STATEMENT OF FACTS

A jury found defendant guilty of maintaining a drug house, MCL 333.7405(1)(d), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, possession of marijuana, MCL 333.7403(2)(d), and receiving and concealing a stolen firearm, MCL 750.535b(2) (Tr II[1] at 129). Defendant was sentenced as an habitual offender to 20 to 180 months' imprisonment for receiving and concealing a firearm and to a consecutive two-year term for felony-firearm (S Tr at 11-12). For maintaining a drug house and possession of marijuana, defendant was sentenced to 193 days in jail with credit for time served. *Id.*

In March, 2015, police executed a search warrant at a house in Benton Harbor, Michigan (Tr I at 107, 167). The owner of the house was not present at the time. *Id.* at 209. The search warrant was based on controlled drug buys by confidential informants, using currency with recorded serial numbers. *Id.* at 203-204. Various drugs, including heroin, cocaine, marijuana, and methylphenidate, were found throughout the house, along with drug-related items (Tr I at 142-152, 209; Tr II at 8-14).

The basement of the house contained two or three separate bedrooms (Tr I at 114). Police found defendant in one of these. *Id.* at 113-115. The money in his pants pocket included one of the bills used in a previous controlled drug buy (Tr I at 179, 205-206; Tr II at 42). In this bedroom were a bed, a nightstand, and a dresser with a television on top of it (Tr I at 115). One of the dresser drawers held some deodorant, $60 in cash, and a digital scale with cocaine and marijuana residue (Tr I at 148, 175; Tr II at 36). Such scales are often used to weigh drugs (Tr I at 178). Another dresser drawer contained a sock holding $2000 in cash; the same drawer held a

[1] "Tr" refers to the trial transcript and is followed by the appropriate volume number in Roman numerals. "S Tr" refers to the sentencing transcript.

September 2014 letter from the Social Security Administration for defendant, but with a different mailing address from that of the raided house (Tr I at 171, 181-182; Tr II at 37-38). More than one drawer contained clothing (Tr II at 46). On the floor of the bedroom was a closed duffel bag filled with men's gym clothing, underneath some of which was a stolen firearm (Tr I at 116, 157-161, 171, 174, 211; Tr II at 39). The bed had sheets, pillows, and a comforter on it (Tr II at 46). On the bed was a tied sandwich baggie containing marijuana, and some loose marijuana was on the bed as well (Tr I at 152, 175-176; Tr II at 35). There were also clothes on the bed (Tr I at 212-213). The investigation revealed that defendant had been at the house at least as far back as October 2014, although the police did not know how often he had been there in the interim (Tr I at 212-213).

Defendant appealed, arguing that the evidence supporting his convictions was insufficient, that the prosecutor had made improper remarks in her rebuttal argument, and that the People had not provided timely notice of their intent to enhance defendant's sentences with prior convictions. Defendant also sought correction of certain information in his presentence investigation report.

On its own motion, the Court of Appeals directed the parties to brief and argue the question:

> Does a conviction for keeping or maintaining a drug house, MCL 333.7405(1)(d), a misdemeanor punishable by up to 2 years in prison, when enhanced under the habitual offender statute, MCL 769.10, constitute a predicate felony for purposes of the offense of possession of a firearm during the commission of a felony, MCL 750.227b[?] [Order, 1/12/17.]

The Court of Appeals majority opinion

The Court of Appeals affirmed defendant's convictions except for the felony-firearm conviction, which it vacated. *Washington*, slip op at 2. Regarding the felony-firearm conviction, the information charged defendant with carrying or possessing a firearm when he "'committed or attempted to commit a felony, to-wit: Maintaining a Drug House.'" *Id.* at 5-6.

The felony-firearm statute, part of the Penal Code, provides that "[a] person who carries or has in his or her possession a firearm when he or she attempts to commit a felony[2] ... is guilty of a felony...." MCL 750.227b(1). The Penal Code defines a felony as "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison." MCL 750.7. A term of imprisonment longer than one year may be served in a state prison. See MCL 769.28, which provides that a term of imprisonment of one year or less must be served in a county jail and not a state prison.

Maintaining a drug house is defined in MCL 333.7405, part of the Public Health Code. MCL 333.7406 prescribes the penalties for maintaining a drug house and states that a criminal conviction renders the offender "guilty of a misdemeanor, punishable by imprisonment for not more than 2 years...." Thus, maintaining a drug house is defined as a misdemeanor in the Public Health Code, but meets the definition of a felony in the Penal Code.

The Court of Appeals majority declared that if it were "writing on [a] blank slate," it would hold that "a two-year misdemeanor qualifies as a felony for purposes of the felony-firearm statute," regardless of whether the two-year misdemeanor was found in the Penal Code, the Public Health Code, or elsewhere. *Washington*, slip op at 9. This was simply "because the offense of felony-firearm is found in the Penal Code and, therefore, we should apply the

[2] The statute exempts certain felonies, not at issue here, from being the predicate felony for a felony-firearm conviction.

definition of 'felony' found in the Penal Code." *Id.*, slip op at 9-10. It would also "avoid the absurdity of treating some two-year misdemeanors as felonies for felony-firearm purposes, while treating others as misdemeanors, with the only distinction being in which code they are found." *Id.*, slip op at 10 n 6.

But the majority did not believe it was writing on a blank slate. *Washington*, slip op at 10. Instead, it believed that three cases dictated a different result.

The first of these was *People v Smith*, 423 Mich 427; 378 NW2d 384 (1985). *Washington*, slip op at 7. *Smith* involved four consolidated cases in which the primary issue was "whether offenses defined in the Penal Code as misdemeanors punishable by up to two years in prison may be considered 'felonies' for the purposes of the habitual-offender, probation, and consecutive sentencing provisions of the Code of Criminal Procedure." *Id.* at 432. The offenses at issue – resisting an officer in the discharge of his duty, MCL 750.479; joyriding, MCL 750.414; and attempted arson of personal property, MCL 750.74, MCL 750.92 – all carried two-year maximum sentences. *Smith*, 423 Mich at 435-437. At the time *Smith* was decided, the sections of the Penal Code that defined those offenses (MCL 750.479, MCL 750.414, and MCL 750.92 as it applied to MCL 750.74) provided that they were misdemeanors,[3] despite MCL 750.7's provision that crimes with two-year maximum sentences are felonies. *Smith*, 423 Mich at 435-438. But MCL 761.1(g) in the Code of Criminal Procedure, much like MCL 750.7 in the Penal Code, defined a felony as a crime for which the offender could be "punished by death or by imprisonment for more than 1 year, or an offense expressly designated by law to be a felony." *Smith*, 423 Mich at 439.

[3] Since then, MCL 750.479 has been amended to make resisting an officer a felony, and the arson statutes, MCL 750.71 – MCL 750.79, have been amended to create different levels of felony and misdemeanor arson offenses.

This Court observed that the Penal Code and the Code of Criminal Procedure were enacted separately and have distinct purposes. *Smith*, 423 Mich at 442. The Penal Code's purpose is "'to define crimes and prescribe the penalties therefor....'" *Id.*, quoting Preamble, MCL 750.1 *et seq.*[4] The purpose of the Code of Criminal Procedure is to "'codify the laws relating to criminal procedure....'" *Smith*, 423 Mich at 442, quoting Preamble, MCL 760.1 *et seq.* Each code, this Court stated, "has its own definitions of 'misdemeanor' and 'felony' in order to more effectively promote the distinct purposes of each.'" *Smith*, 423 Mich at 442. The Court found it "obvious that the Penal Code definitions apply only to the Penal Code," and that the definitions in the Code of Criminal Procedure applied only in that code. *Id.* at 444. "To apply the definition of misdemeanor in one statute to the operations of the other statute," the Court declared, "would defeat the purposes of the other statute." *Id.* Thus, in order to achieve the intended purpose of the Code of Criminal Procedure, the Court held that that code's definition of "felony," and not the definitions in various sections of the Penal Code, controlled in matters governed by the Code of Criminal Procedure, such as habitual offender status, probation, and consecutive sentencing. *Id.* at 445.

In the introduction to its majority opinion in *Smith*, this Court previewed its holding as follows:

> The plain language of the statutes involved, considered in light of the purposes sought to be accomplished, leads us to conclude that the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code, but as felonies for purposes of the Code of Criminal Procedure's habitual-offender, probation, and consecutive sentencing statutes. [*Smith*, 423 Mich at 434.]

[4] This clause has since been amended slightly; it now reads "to define crimes and prescribe the penalties and remedies...."

Seizing on a portion of this language, the Court of Appeals majority in this case interpreted it as a statement that "two-year misdemeanors are misdemeanors for purposes of the Penal Code" – regardless of whether they are designated as misdemeanors in the Penal Code or elsewhere. *Washington*, slip op at 9-10.

The majority recognized that this point in *Smith* was "arguably dicta." *Washington*, slip op at 9. But the majority also pointed to two cases from its own Court: *People v Williams*, 243 Mich App 333; 620 NW2d 906 (2000); and *People v Baker*, 207 Mich App 224; 523 NW2d 882 (1994). *Washington*, slip op at 7-8. In *Williams*, 243 Mich App at 334-335, the defendant pled guilty to resisting arrest pursuant to MCL 750.479, which at the time (as in *Smith*), still defined that crime as a misdemeanor, even though it could be punished by up to two years' imprisonment. After the defendant failed to appear at sentencing, he was convicted of absconding on a felony bond, MCL 750.199a. *Williams*, 243 Mich App at 334. The Court of Appeals reversed, holding that resisting arrest, defined as a misdemeanor in the Penal Code, could not be considered a felony for purposes of establishing the crime of absconding on a felony bond. *Id.* at 335. The Court said, "Although a misdemeanor that may result in two years' imprisonment may be deemed a felony for purposes of … the Code of Criminal Procedure, … it cannot be deemed a felony for purposes of the Penal Code." *Id.*, citing *Smith*. As in *Smith*, the Court in *Williams* did not address the status of a crime designated as a misdemeanor elsewhere than in the Penal Code.

Similarly, in *Baker*, 207 Mich App at 225, the defendant was convicted of felony-firearm based on his simultaneous conviction of resisting a police officer – which, again, was defined under MCL 750.479 at the time as a misdemeanor. The Court of Appeals, citing *Smith*, agreed with the defendant that "the provisions of the Penal Code … govern whether resisting arrest is a

felony for purposes of the felony-firearm statute." *Id.* Thus, resisting a police officer could not establish the felony element of the felony-firearm conviction, which the Court vacated. *Id.* at 225-226. Again, the Court was faced with a crime designated as a misdemeanor in the Penal Code, not in some other legislation.

The Court of Appeals majority in the instant case regarded *Williams* and *Baker*, as "binding precedent … that says that two-year misdemeanors remain misdemeanors for purposes of the felony-firearm statute." *Washington*, slip op at 10. The majority would have followed that precedent and certified a conflict, but "given the statement in *Smith* that two-year misdemeanors are misdemeanors for purposes of the Penal Code," the majority thought it "best to leave it to the Supreme Court to resolve this issues." *Id.* The majority "urge[d] the prosecutor to appeal this case and for the Supreme Court to grant leave and definitively resolve the status of two-year misdemeanors for purposes of the felony-firearm statute." *Id.*

The Court of Appeals dissent

Judge Swartzle began by summarizing his analysis of the relevant case law: "When determining how to characterize a criminal offense that is itself purportedly an element of a different, primary criminal offense, … courts must look solely to the definitions and labels of the code where the primary offense is located." *Washington* (Swartzle, J., dissenting), slip op at 1. In *Smith*, the Court had been faced with whether underlying offenses found in the Penal Code, and labeled therein as misdemeanors, should nonetheless be considered felonies for purposes of the Code of Criminal Procedure because they met the definition of "felony" in the latter code. *Id.*, slip op at 2. The Court had stressed that each code had a distinct purpose and "'has its own definitions of "misdemeanor" and "felony" in order to more effectively promote the distinct

purpose of each.'" *Id.*, slip op at 3, quoting *Smith*, 423 Mich at 442. "[T]he Supreme Court stated in no uncertain terms," Judge Swartzle observed, that "'[t]o apply the definition of misdemeanor in one statute to the operations of the other statute would defeat the purposes of that statute.'" *Washington* (Swartzle, J., dissenting), slip op at 3, quoting *Smith*, 423 Mich at 444. Thus, *Smith*

> stand[s] for the general proposition that location matters: Definitions and labels in a code apply to and throughout that code, but that code alone. When a primary offense and underlying offense are located in the same code, then any conflict is resolved through traditional rules of statutory construction. When the two offenses are located in different codes, the definitions and labels in the primary offense code trump those in the other code. [*Washington* (Swartzle, J., dissenting), slip op at 2.]

Baker and *Williams* simply followed this general proposition. In *Baker*, the underlying offense (resisting arrest) and the primary offense (felony-firearm) were both found in the Penal Code. At that time, the Penal Code specifically labeled resisting arrest as a misdemeanor. The Court's decision that resisting arrest could not be the underlying offense for felony-firearm, therefore, was consistent with *Smith* because it applied the label from the Penal Code when both the underlying and primary offenses were found there. Similarly, in *Williams*, the underlying offense (resisting arrest) and the primary offense (absconding on a felony bond) were both found in the Penal Code. Again, the Court applied the Penal Code label. *Washington* (Swartzle, J., dissenting), slip op at 5.

Judge Swartzle found support for his interpretation in *People v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2008 (Docket No. 279439) (Appendix B). *Washington* (Swartzle, J., dissenting), slip op at 5-6. The defendant in *Thomas* was convicted of possession of marijuana, second offense, MCL 333.7403, MCL 333.7413. Because it was a second offense, it was punishable by imprisonment for up to two years. MCL

333.7413. The defendant in *Thomas* argued that his felony-firearm conviction could not be predicated on the offense of possession of marijuana, second offense, MCL 333.7403, MCL 333.7413, because that offense was specifically designated as a misdemeanor. The Court of Appeals disagreed, noting that under *Baker*, 207 Mich App at 225, "the provisions of the Penal Code … govern whether a particular offense is a felony for purposes of the felony-firearm statute." *Thomas*, slip op at 2. The designation of the crime as a misdemeanor in the Public Health Code was irrelevant in determining whether it was a felony for purposes of the Penal Code. *Id.* The felony-firearm conviction, therefore, was valid. *Id.*, slip op at 2-3.

From all of these cases, Judge Swartzle formulated a general rule:

> When determining how to characterize a criminal offense that is itself purportedly an element of a different, primary criminal offense, courts must look to the definitions and labels in the primary offense's code, full stop. As our case law shows, there are two distinct circumstances to which this general rule will apply: (1) when the underlying offense and primary offense are in different codes (*Smith* and *Thomas*), and (2) when the two offenses are in the same code (*Baker* and *Williams*). In the first circumstance, the general rule dictates that the definitions in the primary offense's code trump any label or definition in the underlying offense's code. This is *Smith* where, for purposes of the primary offense of habitual offender, the Supreme Court applied the definition of felony in the Code of Criminal Procedure to the underlying offenses of joyriding and resisting and obstructing an officer, even though both underlying offenses were labeled misdemeanors in the Penal Code. (Similarly in *Thomas*, where the underlying offense was in the Public Health Code and the primary offense was in the Penal Code.)
>
> In the second circumstance, the general rule requires that a court apply the definitions and labels in the primary offense's code, which is the same code as the underlying offense. Any conflicts between a definition and label within the same code should then be resolved through normal rules of statutory construction, such as the specific trumps the general. This is *Baker* and *Williams*. [*Washington* (Swartzle, J., dissenting), slip op at 6.]

Applying this rule in the case before the Court, Judge Swartzle noted that the primary offense (felony-firearm) was a Penal Code offense, while the underlying offense (maintaining a drug house) was found in the Public Health Code. As in *Smith* and *Thomas*, the primary and

underlying offenses were in different codes. The definitions of "felony" and "misdemeanor" in the Penal Code, therefore, controlled. *Washington* (Swartzle, J., dissenting), slip op at 6. Since the Penal Code, in MCL 750.7, defined "felony" as an offense punishable by imprisonment in state prison, and since maintaining a drug house was punishable by imprisonment in a state prison under MCL 333.7406 and MCL 769.28, maintaining a drug house was a felony under the Penal Code and could be the underlying offense for felony-firearm. *Id.*, slip op at 6-7.

The majority had erred by misconstruing a lone clause from the introduction in *Smith*: "'the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code.'" *Washington* (Swartzle, J., dissenting), slip op at 4, quoting *Smith*, 423 Mich at 434. In context, this clause merely reflected the *Smith* Court's recognition that "the underlying offenses in *Smith* were specifically *labeled* as misdemeanors in the Penal Code and, for purposes of the Penal Code, those specific labels must control over the general definition found in that cod." *Id.*, slip op at 4. The *Smith* Court was not proclaiming a general rule that *all* two-year misdemeanors were considered misdemeanors for purposes of the Penal Code, regardless of whether they came from the Penal Code or some other code. *Id.*, slip op at 4-5. The Penal Code contained no suggestion that the Legislature intended such a rule, and the majority's interpretation ignored *Smith*'s discussion of "the key distinction to be drawn between definitions and labels within codes versus those across codes." *Id.*, slip op at 5.

Additional facts will be set forth as needed in the argument.

ARGUMENT

The Penal Code defines the offense of possession of a firearm during the commission of a felony (felony-firearm). The Penal Code also defines "felony," and the offense of maintaining a drug house meets that definition. Thus, maintaining a drug house is a felony for purposes of the felony-firearm statute, regardless of how it is labeled in the Public Health Code.

Standard of Review. This issue presents a question of statutory construction. Such questions are reviewed de novo. *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005).

The statutory construction required in this case is straightforward. The Penal Code proscribes the possession of a firearm during the commission of a felony (felony-firearm). MCL 750.227b(1). The same code defines a felony to include any offense punishable by imprisonment in a state prison. MCL 750.7. Maintaining a drug house is punishable by imprisonment in a state prison. MCL 333.7406; MCL 769.28. By the plain language of the Penal Code, therefore, maintaining a drug house is a felony[5] and can be the underlying felony for a conviction of felony-firearm. Appellate courts are to "construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). The above analysis is merely the application of this principle to the Penal Code.

Both the majority and the dissent in the Court of Appeals agreed with this reasoning. *Washington*, slip op at 9-10; *Washington* (Swartzle, J., dissenting), slip op at 6-7. But the

[5] Defendant argued in the Court of Appeals that maintaining a drug house also met the Penal Code's definition of a misdemeanor in MCL 750.8: "When any act or omission, *not a felony*, is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor" (emphasis added). But as the emphasized words show, if an offense meets the definition of felony in MCL 750.7, the definition of misdemeanor in MCL 750.8 does not apply.

majority felt restrained from applying it because the majority misconstrued part of a statement from this Court in *Smith*. According to the majority's misreading of *Smith*, the Legislature intended *all* "two-year misdemeanors" to be considered as misdemeanors under the Penal Code, despite the Penal Code's declaration that they are felonies, and regardless of whether they were designated as misdemeanors in the Penal Code or somewhere else. The majority's analysis and conclusion on this point were in error.

The question in *Smith* was "whether offenses defined in the Penal Code as misdemeanors punishable by up to two years in prison may be considered 'felonies' for the purposes of the habitual-offender, probation, and consecutive sentencing provisions of the Code of Criminal Procedure." 423 Mich at 432. This Court correctly concluded that they could, since the definitions of "felony" and "misdemeanor" in the Code of Criminal Procedure, rather than those in the Penal Code, applied. *Id.* at 445. It was in this context that this Court stated:

> The plain language of *the statutes involved*, considered in light of the purposes sought to be accomplished, leads us to conclude that the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code, but as felonies for purposes of the Code of Criminal Procedure's habitual-offender, probation, and consecutive sentencing statutes. [*Id.* at 434 (emphasis added).]

In other words, the Court was saying, the fact that the Legislature defined some crimes as misdemeanors in the Penal Code did not affect their status as felonies under the definition in the Code of Criminal Procedure. The Legislature intended two-year misdemeanors *defined as such in the Penal Code* – the only "statutes involved" that defined the two-year misdemeanors under consideration in *Smith* – to be considered as misdemeanors only for purposes of the Penal Code.

But as Judge Swartzle pointed out, the Court of Appeals majority in this case pulled the clause "the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code" out of this context. This Court in *Smith* had no occasion to consider

the status, for purposes of the Penal Code, of an offense defined as a two-year misdemeanor *outside* the Penal Code.[6] The Court of Appeals majority in this case simply construed this clause too broadly.

Unfortunately, this was not the first time the Court of Appeals made this mistake. In *Williams*, the Court stated generally, "Although a misdemeanor that may result in two years' imprisonment may be deemed a felony for purposes of the … Code of Criminal Procedure, … it cannot be deemed a felony for purposes of the Penal Code." 243 Mich App at 335, citing *Smith*. Like the majority in this case, the Court in *Williams*, which was faced with an offense defined as a misdemeanor in the Penal Code, made this overbroad statement of the holding in *Smith* without regard to the origin of the two-year misdemeanor.

Far from supporting the majority's conclusion, as Judge Swartzle noted, *Smith* declared that for purposes of a particular legislative code, definitions within that code should control and should trump contrary definitions from other codes. *Washington* (Swartzle, J., dissenting), slip op at 2. Different codes have different purposes and supply their own definitions to advance those distinct purposes. *Smith*, 423 Mich at 442. "To apply the definition of misdemeanor in one statute to the operations of the other statute would defeat the purposes of the other statute." *Id.* at 444.

That principle is just as applicable here, where the question is whether to apply a definition of misdemeanor in the Public Health Code to the operations of the Penal Code. The Penal Code is intended to "'define crimes and prescribe the penalties therefor,'" *Smith*, 423 Mich at 437, quoting Preamble, MCL 750.1 *et seq.*. The purpose of the Public Health Code, as

[6] Even if this Court's language in *Smith* could plausibly be read as addressing this question, it would be dictum because the question was unnecessary to the Court's decision of the case before it. See *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011).

expressed in the Preamble to MCL 333.1101 *et seq.*, is very lengthy, but the primary purpose is to "protect and promote the public health." The extended statement of purpose includes, as one of more than 20 other phrases, "to provide for penalties and remedies." But unlike the Penal Code, the Health Code does not include the expressed intent to "define crimes." More particularly and significantly, the Health Code does not purport to define the crime of felony-firearm. The Penal Code does that by proscribing the possession of a firearm during the commission of a felony, MCL 750.227b, and by defining "felony," MCL 750.7. To paraphrase *Smith*, applying the Public Health Code's designation of an offense as a misdemeanor to the operations of the Penal Code would defeat the purposes of the Penal Code.

The majority's reading of *Smith* in this case also contradicts the principle that this Court will "'read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.'" *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003), quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The Penal Code contains its own definition of "felony," and that definition is unambiguous. Neither MCL 750.227b, nor MCL 750.7, nor any other part of the Penal Code directs the reader to another code's designation of an offense as a felony or misdemeanor, much less having that designation supplant the Penal Code's own definition.[7] To the contrary, the Penal Code instructs, "All provisions of this act shall be construed according to the fair import of

[7] A more difficult issue arises when the underlying felony to a felony-firearm charge is an offense which the Penal Code defines as a misdemeanor, yet assigns a penalty that makes it a felony under MCL 750.7. *Baker* and *Williams* held that the specific designation as a misdemeanor controls, but one could argue that in interpreting MCL 750.227b (the felony-firearm statute), a court should look to the general definition of "felony" in MCL 750.7. But this Court need not reach that issue in this case since the Penal Code contains no such apparent contradiction regarding offenses described outside the Penal Code.

their terms, to promote justice and to effect the objects of the law." MCL 750.2 (emphasis added).

Also, the authors of the Penal Code knew how to incorporate other statutes when they so desired:

> When the performance of any act is prohibited by this or *any other statute*, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition, or in *any other* section or *statute*, the doing of such act shall be deemed a misdemeanor. [MCL 750.9 (emphasis added).]

In MCL 750.9, the Legislature *has* directed the reader to other codes. If any statute, inside or outside the Penal Code, creates a crime, but no penalty is provided anywhere, that crime is a misdemeanor.

The omission of a provision from some parts of a statutory scheme and the inclusion of that provision in other parts should be construed as intentional. *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006), quoting *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Had the Legislature so desired, it could have written MCL 750.7 to say something like:

> The term "felony" when used in this act, shall be construed to mean an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison, *unless any other statute designates that crime as a misdemeanor*.

Or the Legislature could have included a similar restriction in the felony-firearm statute itself. It did neither. Instead, it declared that if an offender may be punished by imprisonment in state prison, the offense is a felony. Period.

The Court of Appeals majority further erred by looking to the definition of "felony" in the Code of Criminal Procedure,[8] which is not implicated in this case:

> In the instant case, it appears that the only potential means of justifying the treatment of the keeping or maintaining a drug house offense as the underlying felony for a felony-firearm conviction is to apply the Code of Criminal Procedure's felony definition to turn what is otherwise a two-year misdemeanor into a felony. Keeping or maintaining a drug house is explicitly classified as a misdemeanor.... The felony definition in the Code of Criminal Procedure cannot be used to make a two-year misdemeanor offense that is located in a different act, such as the Penal Code or the Public Health Code into a felony; the offense of keeping or maintaining a drug house cannot be transformed into a felony for purposes of the felony-firearm statute. [*Washington*, slip op at 8-9 (emphasis added; footnotes omitted).]

The majority called the definition of felony in the Code of Criminal Procedure "the only potential means of justifying" a decision that maintaining a drug house could be the underlying felony for a felony-firearm conviction. But neither the People nor Judge Swartzle's dissent relied on the definition of felony in the Code of Criminal Procedure. They relied on the definition of felony in the Penal Code because that is the code that defines felony-firearm. The majority's discussion of the Code of Criminal Procedure is hard to explain, since the majority itself stated that, but for its reading of *Smith*, it would have relied on the definition of felony in the Penal Code. *Washington*, slip op at 9-10.

As Judge Swartzle observed, the Court of Appeals correctly analyzed this issue in *Thomas*. The defendant in *Thomas* argued that his felony-firearm conviction could not be predicated on the offense of possession of marijuana, MCL 333.7403, because that offense was specifically designated as a misdemeanor. The Court of Appeals disagreed:

> As defendant notes, possession of marijuana is expressly designated as a misdemeanor under the Public Health Code. However, this Court has explicitly

[8] The Code of Criminal Procedure defines "felony" as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g).

> stated that the provisions of the Penal Code, MCL 750.1 *et seq.*, govern whether a particular offense is a felony for purposes of the felony-firearm statute. See *People v Baker*, 207 Mich App 224, 225; 523 NW2d 882 (1994). Thus, contrary to defendant's argument, the designation of the offense of possession of marijuana as a misdemeanor in the Public Health Code is irrelevant in determining whether the crime constitutes a felony for purposes of the Penal Code.
>
> The Penal Code provides, "The term 'felony' *when used in this act*, shall be construed to mean an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison." MCL 750.7 (emphasis added). Because defendant's conviction of possession of marijuana, second offense, was punishable by imprisonment for up to two years, MCL 333.7413(2),[9] we find that it constitutes a felony under the Penal Code. The felony-firearm conviction based on the predicate conviction of possession of marijuana, second offense, is therefore valid. [*Thomas*, slip op at 2-3.]

The result in *Thomas* should have been the result in this case. This Court should reverse the Court of Appeals and reinstate defendant's felony-firearm conviction. This Court should hold that a crime that constitutes a felony under MCL 750.7 is to be considered a felony for purposes of the Penal Code, including the felony-firearm statute, regardless of how it is labeled elsewhere. The Court should clarify or repudiate the language in *Smith* and *Williams* to the extent it could be read to support a contrary result.

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[9] The enhanced sentencing provision of the Public Health Code, MCL 333.7413, made all the difference in *Thomas*. A first offense of possession of marijuana is punishable by "imprisonment for not more than 1 year." MCL 333.7403(2)(d). That sentence could not be served in a state prison. MCL 769.28. Thus, a first offense of possession of marijuana would not have qualified as a felony under MCL 750.7. It was the enhanced sentence that rendered the crime a felony.

In this case, neither the Court of Appeals majority nor the dissent addressed the impact of the habitual offender statute, MCL 769.10, which raised defendant's maximum penalty for maintaining a drug house to three years' imprisonment. But this does not change the analysis. Even without the enhancement, maintaining a drug house is punishable by imprisonment in a state prison, and thus is a felony under MCL 750.7.

REQUEST FOR RELIEF

The People request that this Court peremptorily reverse the Court of Appeals majority opinion and reinstate defendant's felony-firearm conviction. In the alternative, the People request that this Court grant leave to appeal.

DATED: August 14, 2017

Respectfully submitted,

/s/ Aaron J. Mead

AARON J. MEAD (P49413)
Assistant Prosecuting Attorney